U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 30 September 2002

CASE NO.: 2002-STA-0023

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,
Prosecuting Party, and

JAMES HARRELL, DAVID MAY, ROBERT LINKENHOKER, RODNEY MOORE, and JOHN WOMACK,
Complainants,

v.

SYSCO CORPORATION, d/b/a SYSCO FOOD SERVICES OF BALTIMORE,
Respondent.

DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

The instant case has been brought under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 ("STAA") with implementing regulations at Title 29, Part 1978 of the Code of Federal Regulations. The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms or privileges of employment because the employee has undertaken protected activity either (1) by participating in proceedings relating to the violation of commercial motor vehicle safety regulations or (2) by refusing to operate a motor vehicle due to concerns about such violations or reasonable apprehension of serious injury because of the vehicle's unsafe condition. The instant case arises out of a complaint filed by Complainant Harrell on September 14, 2000 (date stamped as received October 6, 2000), on behalf of himself and similarly situated employees.[1] The Occupational Safety and Health Administration (OSHA) found the STAA complaint to be meritorious, by an undated

[1] The complaint was filed under section 11(c) of the Occupational Safety and Health Act (prohibiting an employer from undertaking discriminatory action against an employee who filed a complaint alleging health and/or safety violations), which is deemed to be a complaint under the STAA pursuant to 29 C.F.R. § 1978.102(e). As I advised in my Order of May 20, 2002, counsel's assertion that there was no written complaint is contrary to the express provision of section 1978.102(e).

Order submitted to the parties on or about January 16, 2002,[2] and the Respondent appealed on February 14, 2002. As the claim was found to have merit, the Assistant Secretary of Labor is the prosecuting party.

Under cover letter of June 26, 2002, counsel for the Assistant Secretary submitted for approval a settlement agreement signed by all of the parties together with a draft Consent Order and an Exhibit "A", collectively entitled "Stipulation of Settlement and Consent Order," which are annexed hereto and incorporated by reference herein.[3] Although the pages on the Stipulation of Settlement [hereafter "Settlement Agreement"] are misnumbered, with the first page numbered "2", it is a complete agreement signed by all parties that satisfies the requirements of 29 C.F.R. § 1978.111(d)(2).

When this matter was initially brought, Mr. Harrell indicated that he wished to withdraw his claim because of a settlement he had reached in a state worker's compensation case (and an associated settlement reached in the U.S. District Court for the District of Maryland, L-00-CV-2098, L-00-CV-3225), and the Assistant Secretary moved for withdrawal of findings relating to him and his dismissal on the same basis. Neither agreement made any reference to the STAA.[4] However, as I indicated in my May 20, 2002 "Order Amending Case Caption, Denying Respondent's Motion for Summary Decision and to Dismiss, and Canceling Hearing," I would be able to recommend dismissal if stipulated to by all parties, under Fed. R. Civ. P. 41(a)(1)(ii). ***See*** 29 C.F.R. §§ 18.1(a), 1978.106(a); ***Monroe v. Q.T. Transfer & Storage,*** 1989-STA-0004 (Sec'y July 11, 1989). Further consideration of this matter became unnecessary in view of the agreement between the parties, but it is within this context that I review the agreement between the parties.

By letter of June 4, 2002, Mr. Harrell expressed qualms about signing the settlement agreement because of a suit that had allegedly been filed against him by Sysco in February 2002 in retaliation for his filing of the complaint that gave rise to this action, and he indicated that he was

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[2] Apparently OSHA did not retain copies of its determination letters, and letters relating to a different case were provided to this office by OSHA. However, copies of the letters to Sysco Food Services of Baltimore and certain Complainants, including Complainant Harrell, have been provided to the undersigned by the parties.

[3] An earlier, unsigned version of this agreement had been previously submitted, and disembodied signature pages were separately submitted. As it was unclear exactly what the parties had signed, I required in my May 20, 2002 Order that complete copies of the documents signed be provided. It has been difficult explaining to counsel that, although all of the signatures need not be on the same page of an agreement (and duplicate originals are allowable), a signature page unattached to any agreement is not sufficient to establish an agreement between the parties.

[4] To be valid under the STAA, such an agreement would be limited to causes of action arising out of facts occurring before the date of the agreement. ***Tankersley v. Triple Crown Services, Inc.***, 1992-STA-0008 (Sec'y Feb. 1, 1995). ***See also Stack v. Preston Trucking Co., Inc.,*** 1992-STA-0021 (Sec'y March 24, 1995).

represented by an attorney in that action, which was still pending.[5] Counsel for the parties had previously advised me at a telephone conference of only one related action that was currently pending, specifically the case that Sysco Corporation brought against the Secretary of Labor in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 01-2566. In my response to Mr. Harrell of June 5, 2002, I cautioned him about the prohibition against ex parte contacts and advised him that I could not give him legal advice and assistance and that he should consult his counsel. Thereafter, Mr. Harrell signed the agreement, and my concern that he knowingly read, understand, and sign the settlement agreement was satisfied by the execution by all parties of a single document incorporating the entire agreement between the parties. However, I still had some concerns as to the fairness and reasonableness of the settlement due to the other alleged pending action.

In response to my Order of July 10, 2002, counsel for the parties submitted copies of the pleadings filed in Case No. 13-C-02-50866 in the Circuit Court for Howard County, Maryland. The parties disagreed as to whether that case was related to the instant case, so a conference was scheduled to be held before the undersigned for the purpose of discussing the current settlement. At the August 14, 2002 conference, at which representatives for the Assistant Secretary, Mr. Harrell, and Sysco attended, the merits of the settlement, the extent to which the Assistant Secretary may be deemed to represent the interests of individual Complainants, the subject matter of the Howard County case, and other issues were discussed. At the conference, the parties were able to state their positions on the issues pending before me and I was able to question counsel. Following a break, the parties proposed that Sysco agree that the case pending in Howard County did not include breach of contract due to Mr. Harrell's failure to dismiss his STAA claim. I agreed to approve of the proposed settlement if the Howard County judge were so advised and a copy of such advice were filed before me. (Transcript of Conference at pages 47 to 49). The transcript was not received until September 10, 2002, and at that time the Assistant Secretary filed a Motion for Order to Show Cause and Request for Status Hearing, because Respondent had not yet filed the agreed upon notice. However, Respondent filed with the undersigned a copy of a September 24, 2002 letter (referencing Case No. 13-C-02-050866 in the Circuit Court for Howard County) sent from its counsel to Mr. Harrell's counsel indicting that, contingent upon dismissal of this STAA action, "any claim for breach of contract against [Mr. Harrell] as a result of his participation in and failure to take steps to effectuate a dismissal of the STAA action, will be waived by [Respondent]", and the correspondence was file-stamped by the Circuit Court for Howard County. Thus, Respondent has filed the agreed upon document with the Howard County Court and the Assistant Secretary's motion is now moot.

Pursuant to STAA, 49 U.S.C. § 31105(b)(2)(C), "[b]efore the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary, the complainant, and

[5] Mr. Harrell's signature appeared on the disembodied signature page submitted to the undersigned prior to the date of his correspondence, which raises issues as to whether he knew what he was agreeing to at that time. No specifics were provided concerning the other alleged lawsuit, and I was unaware that a pending suit in addition to Civil Action No. 01CV2566 (E.D. PA) was alleged prior to the June 4, 2002 letter.

the person alleged to have committed the violation." The regulations relating to settlements of STAA cases provide, in pertinent part:

> (2) ***Adjudicatory settlement.*** At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and such settlement is approved by . . . the ALJ [the administrative law judge to whom the matter has been assigned]. A copy of the settlement shall be filed with the ALJ . . . .

29 C.F.R. § 1978.111(d)(2). Although a recommended dismissal order must be forwarded for approval by the Administrative Review Board, administrative law judge decisions approving proposed settlement agreements become final without such review or approval. ***Id. See Fisher v. ABC Trailer Sales, & Rental, Inc.,*** ARB No. 98-123, 1997-STA-0020 (ARB May 29, 1998); ***Pettit v. Des Moines Asphalt & Paving Co.***, ARB No. 97-32,1996-STA-0003 (ARB Dec. 30, 1996). In reviewing a settlement agreement under the STAA, I must determine whether it constitutes a fair, adequate and reasonable settlement of Complainants' allegations that Respondent violated the STAA. ***Tankersley v. Triple Crown Services, Inc.,*** 1992-STA-0008 (Feb. 1, 1995). ***See also Champlin v. Firilli Corp.,*** 1991-STA-7 (Sec'y May 20, 1992) (adequacy of consideration depends upon whether a party received something of value to which he was not already unquestionably entitled.)

Having reviewed the Settlement Agreement, I find that the proposed settlement is fair, adequate and reasonable, and my concerns as to the pending Howard County action against Mr. Harrell have been satisfied. Although the Settlement Agreement does not specifically require Respondent to implement the terms of the proposal appearing as Exhibit A, counsel for Respondent at the conference before me has acknowledged that, although Respondent has not agreed to adoption of the policy on a permanent basis, implementation of the proposal appearing as Exhibit A is implicit. (Transcript of Conference at pages 21 to 23). I also find that the Settlement Agreement, together with the procedure described in Exhibit A, is an appropriate and fair resolution of the issues presented and provides adequate relief to the individual Complainants.

Accordingly, I make the following Findings and issue the following Order:

FINDINGS

1. The Settlement Agreement constitutes a fair, adequate and reasonable settlement of Complainants' allegations that Respondent violated the STAA.

2. This Decision and Order Approving Settlement and Dismissing Complaint shall have the same force and effect as an Order made after a full hearing.

3. The Settlement Agreement comports in all material respects with the requirements of 29 C.F.R. §1978.111.

4. All of the findings, terms and conditions of the Settlement Agreement are incorporated by reference herein.

ORDER

IT IS HEREBY ORDERED that the Settlement Agreement be, and hereby is, **APPROVED;** and

IT IS FURTHER ORDERED that the parties shall comply with the terms of the Settlement Agreement; and

IT IS FURTHER ORDERED that this action be, and hereby is, **DISMISSED WITH PREJUDICE**; and each party shall bear his or its own costs, expenses, and attorney fees incurred in connection with this action.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.